IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 7, 2004 Session

MARK DION DAVIS v. TONYA SMITH DAVIS

Appeal from the Chancery Court for Lawrence County
No. 10543-01 Stella L. Hargrove, Judge

No. M2003-02312-COA-R3-CV - Filed October 12, 2004

This appeal concerns a dispute over the custody of a child who is less than three years old. Within four months after the parents' divorce in the Chancery Court for Lawrence County, the father filed a petition to modify the permanent parenting plan because the mother was obstructing and discouraging his visitation with the child. Following a bench trial, the trial court determined that the wife's post-divorce conduct amounted to a material change in circumstances and that the parents should have equal residential time with the child. The trial court also relieved the father of his child support obligation in light of the change in the permanent parenting plan. The mother has appealed both the change in the permanent parenting plan and the termination of her child support. While we affirm the trial court's decision to award the parents equal residential time, we vacate the decision with regard to child support.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part and Vacated in Part

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN and PATRICIA J. COTTRELL, JJ., joined.

Randy Hillhouse, Lawrenceburg, Tennessee, for the appellant, Tonya Smith Davis.

Christopher V. Sockwell, Lawrenceburg, Tennessee, for the appellee, Mark Dion Davis.

OPINION

I.

Mark Davis and Tonya Smith Davis ("Ms. Smith") married on November 11, 2000 and separated four months later. Before their separation, the couple conceived a child, Katie Davis, who was born on December 27, 2001. They were divorced in the Chancery Court for Lawrence County in February 2002. The permanent parenting plan they entered into at that time allowed Ms. Smith to care for Katie at all times except for two hours each Sunday, Tuesday, and Thursday, certain holidays, two weeks during each summer, and at other such times as both parties agreed. The parenting plan further provided that all major decisions regarding education, non-emergency health care, and religion would be made jointly.

Despite the spirit of cooperation reflected in the permanent parenting plan, Ms. Smith quickly set about obstructing Mr. Davis's efforts to nurture his relationship with Katie. In June 2002, Mr. Davis filed a petition in the Chancery Court for Lawrence County asserting that Ms. Smith had denied him reasonable visitation opportunities and had refused to consult with him when making major decisions concerning Katie. He alleged that Ms. Smith had refused to allow him the two weeks of summer visitation. Mr. Davis also asserted that while Ms. Smith was at work she insisted on placing Katie in daycare even though he was available to care for Katie during the day. In addition, he alleged that Ms. Smith made major decisions without consulting him, including choosing Katie's daycare and physician. Because of Ms. Smith's efforts to exclude him from Katie's life, Mr. Davis requested either to have equal parenting time with Katie or to be designated as the primary residential parent.

Ms. Smith denied Mr. Davis's allegations and filed a counter-petition, which she withdrew at trial, alleging that she had concerns as to Mr. Davis's parenting ability. She sought a home study, counseling, increased child support, and a restraining order against Mr. Davis to prevent him from coming to her work, church, and Katie's doctor's office and daycare. Ms. Smith accused Mr. Davis of exhibiting strange, disruptive, and harassing behavior around Katie. She also filed a motion to dismiss Mr. Davis's petition to modify the parenting plan.

The trial court declined to dismiss Mr. Davis's petition and conducted a hearing in July 2003. During the hearing, both parties stated that the original parenting plan was not in Katie's best interests. Accordingly, the court awarded equal parenting time to Ms. Smith and Mr. Davis on an alternating four-day schedule and terminated Mr. Davis's child support obligation accordingly. After noting that it was impressed with Mr. Davis's desire to be involved in Katie's life, the court observed that the parties' inability to communicate effectively was not in Katie's best interests and recommended individual and group counseling. On this appeal, Ms. Smith takes issue with the trial court's decisions to modify the permanent parenting plan and to terminate her child support.

II.
THE STANDARD OF REVIEW

Custody and visitation decisions are among the most important decisions that courts make. *Steen v. Steen*, 61 S.W.3d 324, 327 (Tenn. Ct. App. 2001); *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 484 (Tenn. Ct. App. 1997). Their chief purpose is to promote the child's welfare by creating an environment that promotes a nurturing relationship with both parents. *Aaby v. Strange*, 924 S.W.2d 623, 629 (Tenn. 1996).

Children thrive in stable environments. *Aaby v. Strange*, 924 S.W.2d at 627; National Interdisciplinary Colloquium on Child Custody, *Legal and Mental Health Perspectives on Child Custody Law: A Deskbook for Judges* § 5:1, at 51 (1998) ("*Legal and Mental Health Perspectives on Child Custody Law*"). Accordingly, the courts favor existing custody arrangements. *Taylor v. Taylor*, 849 S.W.2d 319, 332 (Tenn. 1993); *Hoalcraft v. Smithson*, 19 S.W.3d 822, 828 (Tenn. Ct. App. 1999). In fact, a custody decision, once made and implemented, is considered res judicata upon the facts in existence or reasonably foreseeable when the decision was made. *Young v. Smith*, 193

Tenn. 480, 485, 246 S.W.2d 93, 95 (1952); *Steen v. Steen*, 61 S.W.3d at 327; *Solima v. Solima*, 7 S.W.3d 30, 32 (Tenn. Ct. App. 1998).

Despite a preference for continuing existing custody arrangements, the courts have recognized that the circumstances of children and their parents change. Accordingly, our statutes and decisions empower the courts to alter custody arrangements when intervening circumstances require modifications. Tenn. Code Ann. § 36-6-101(a)(1) (Supp. 2003). Thus, courts may modify an existing custody arrangement when required by unanticipated facts or subsequently emerging conditions. *Smith v. Haase*, 521 S.W.2d 49, 50 (Tenn.1975); *Adelsperger v. Adelsperger*, 970 S.W.2d at 485. In the interests of stability in the child's life, a court should not alter an existing custody arrangement until (1) it is satisfied either that the child's circumstances have changed in a material way since the entry of the presently operative custody decree or that a parent's circumstances have changed in a way that affects the child's well-being, (2) it has carefully compared the current fitness of the parents to be the child's custodian, and (3) it has concluded that changing the existing custody arrangement is in the child's best interests. *Kendrick v. Shoemake*, 90 S.W.3d 566, 570 (Tenn. 2002); *Blair v. Badenhope*, 77 S.W.3d 137, 150 (Tenn. 2002).

There are no bright line rules for determining when a change of circumstances should be deemed material enough to warrant changing an existing custody arrangement. *Kendrick v. Shoemake*, 90 S.W.3d at 570; *Taylor v. Taylor*, 849 S.W.2d at 327; *Solima v. Solima*, 7 S.W.3d at 32. These decisions turn on the unique facts of each case. As a general matter, however, the following principles illuminate the inquiry. First, the change of circumstances must involve either the child's circumstances or a parent's circumstances that affect the child's well-being. *Kendrick v. Shoemake*, 90 S.W.3d at 570. Second, the changed circumstances must have arisen after the entry of the custody order sought to be modified. *Turner v. Turner*, 776 S.W.2d 88, 90 (Tenn. Ct. App. 1989). Third, the changed circumstances must not have been reasonably anticipated when the underlying decree was entered. *Adelsperger v. Adelsperger*, 970 S.W.2d at 485. Fourth, the change in circumstances must affect the child's well-being in some material way. *Kendrick v. Shoemake*, 90 S.W.3d at 570; *Blair v. Badenhope*, 77 S.W.3d at 150; *Hoalcraft v. Smithson*, 19 S.W.3d at 829.

The person seeking to change an existing custody arrangement has the burden of demonstrating both that the child's circumstances have changed materially and that the best interests of the child require a change in the existing custody arrangement. *In re Bridges*, 63 S.W.3d 346, 348 (Tenn. Ct. App. 2001); *Musselman v. Acuff*, 826 S.W.2d 920, 922 (Tenn. Ct. App. 1991). The threshold question is whether there has been a material change in the child's circumstances. *Kendrick v. Shoemake*, 90 S.W.3d at 570; *Blair v. Badenhope*, 77 S.W.3d at 150; *Placencia v. Placencia*, 48 S.W.3d 732, 736 (Tenn. Ct. App. 2000). If the person seeking the change of custody cannot demonstrate that the child's circumstances have changed in some material way, the trial court should not re-examine the comparative fitness of the parents, *Caudill v. Foley*, 21 S.W.3d 203, 213 (Tenn. Ct. App. 1999), or engage in a "best interests of the child" analysis. Rather, in the absence of proof of a material change in the child's circumstances, the trial court should simply decline to change custody. *Hoalcraft v. Smithson*, 19 S.W.3d at 828.

Custody and visitation decisions often hinge on subtle factors, including the parents' demeanor and credibility during the divorce proceedings themselves. *Adelsperger v. Adelsperger*,

970 S.W.2d at 485. Accordingly, trial courts have broad discretion to fashion custody and visitation arrangements that best suit the unique circumstances of each case. *Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn. 1999); *Suttles v. Suttles*, 748 S.W.2d 427, 429 (Tenn. 1988); *Helson v. Cyrus*, 989 S.W.2d 704, 707 (Tenn. Ct. App. 1998). It is not our role to "tweak [these decisions] . . . in the hopes of achieving a more reasonable result than the trial court." *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001).

However, trial courts must base their custody and visitation decisions on the evidence and on an appropriate application of the relevant legal principles. *D v. K*, 917 S.W.2d 682, 685 (Tenn. Ct. App. 1995). Thus, we review these decisions de novo on the record with a presumption that the trial court's findings of fact are correct unless the evidence preponderates otherwise. *Nichols v. Nichols*, 792 S.W.2d 713, 716 (Tenn. 1990); *Swett v. Swett*, No. M1998-00961-COA-R3-CV, 2002 WL 1389614, at *5 (Tenn. Ct. App. June 27, 2002) (No Tenn. R. App. P. 11 application filed); Tenn. R. App. P. 13(d). A trial court's decision regarding custody or visitation should be set aside only when it "falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record." *Eldridge v. Eldridge*, 42 S.W.3d at 88.

III.
THE MODIFICATION OF THE RESIDENTIAL SCHEDULE

Ms. Smith takes issue with the trial court's decision to modify the residential schedule on two grounds. First, she asserts that no material change of circumstances has occurred that would require a change in the residential schedule. Second, she insists that even if the circumstances had materially changed, giving the parties equal parenting time was not in Katie's best interest. We disagree with both arguments.

A parent's failure to adhere to the requirements of a permanent parenting plan can be considered a material change in circumstances. Tenn. Code Ann. § 36-6-101(a)(2)(B) (Supp. 2003). This record contains abundant evidence that Ms. Smith has refused to adhere to the plain requirements of the parenting plan and that she has purposely and deliberately embarked on a course which, if not stopped, would eventually erode the relationship between Mr. Davis and Katie. Accordingly, we find that the trial court's conclusion that the circumstances had changed materially following the divorce is amply supported by the record.

Ms. Smith also asserts on appeal that Mr. Davis presented no evidence to show that a change in residential schedule would be in Katie's best interests. While both parties agreed at trial that the permanent parenting plan was not working and that it should be modified, Ms. Smith insists that the only change that was warranted was to give Mr. Davis increased visitation time. She argues that the trial court went too far when it decided to grant the parties equal parenting time. Again, we disagree.

The trial court considered such factors as Katie's young age, the stability of her relationship with both parents, and the willingness and ability of both parents to care for and address her needs. The court noted that Katie's relationships with both parents should be fostered unless inconsistent with Katie's best interests. The trial court found no such inconsistency and, in fact, concluded that it had discovered "nothing in the record that indicates the father does not provide nurturing and love"

to Katie while she is in his care and control. After careful review of the record, this Court finds no basis upon which to hold that the equal parenting plan is not presently in Katie's best interests.

During oral argument, this court expressed some concern about the long-term viability of the revised residential schedule because the parents are currently living in different cities that are more than one hour's drive apart. Shuttling Katie back and forth every four days will no longer be in her best interests when she begins school. Ms. Smith insists that these potential difficulties provide a sufficient basis to vacate the revised residential schedule and to designate her as the primary residential parent. We respectfully disagree. Courts must base their decisions on the evidence of what has already happened, not on speculation about what might happen in the future. These parents have the power to avoid these potential difficulties by working out a mutually satisfactory parenting arrangement once Katie begins school.

IV.
THE TERMINATION OF MR. DAVIS'S CHILD SUPPORT

Ms. Smith also takes issue with the trial court's decision to relieve Mr. Davis of his child support obligation. She asserts that the trial court erred because Mr. Davis had not requested the court to modify his child support and because the parties did not present evidence regarding the factors relevant to child support modifications. While the trial court's decision to terminate Mr. Davis's child support obligation had a sound legal foundation when it was made, a recent Tennessee Supreme Court decision requires us to remand the case for further proceedings regarding child support. *See Hopkins v. Hopkins*, ___ S.W.3d ___, ___, 2004 WL 2151200 (Tenn. 2004).

When the trial court conducted the July 2003 hearing, the prevailing view was that only a parent who spent a greater amount of time with his or her child was entitled to receive child support. *Gray v. Gray*, 78 S.W.3d 881, 884 (Tenn. 2002). Accordingly, this court had held on at least two prior occasions that neither parent is entitled to child support when (1) neither parent is designated as the primary residential parent and (2) the residential schedule grants the parents equal parenting time. *Cox v. Cox*, No. E2002-020340COA-R3-CV, 2003 WL 1797944, at *4 (Tenn. Ct. App. Mar. 31, 2003) (No Tenn. R. App. P. 11 application filed); *Baily v. Capps*, No. M1999-02300-COA-R3-CV, 2001 WL 310643, at *4 (Tenn. Ct. App. Apr. 2, 2001) (No Tenn. R. App. P. 11 application filed). Because the trial court had awarded Mr. Davis and Ms. Smith precisely equal parenting time, neither one of them was entitled to child support under the law as it stood at that time.

On the same day that this court filed its original opinion in this case, the Tennessee Supreme Court handed down an opinion that changed the law with regard to the effect that an award of equal parenting time has on the parents' child support obligations. The court "decline[d] to adopt a bright-line rule that no child support is owed when a child's residential time is divided equally between the parents." *Hopkins v. Hopkins*, ___ S.W.3d ___, ___, 2004 WL 2151200, at *2 (Tenn. 2004). This holding undermines the continuing validity of *Cox v. Cox* and *Baily v. Capps* and requires us to withdraw our original opinion.

Hopkins v. Hopkins involves two working parents with significantly different salaries. Victor Hopkins's annual income was more than twice as much as Synthia Hopkins's income. When they

were divorced in July 2002, the trial court determined that their children would reside with Mr. Hopkins for 235 days a year and directed Ms. Hopkins to pay Mr. Hopkins $681 per month in child support. On appeal, Ms. Hopkins asserted that the trial court had awarded Mr. Hopkins too much residential time. This court agreed and determined that the children's best interests would be best served by dividing their physical custody equally between the parents. We also decided that Mr. Hopkins should pay Ms. Hopkins $800 per month in child support to equalize the resources available to the children. Tenn. Comp. R. & Regs. r. 1240-2-4-.02(2)(e) (2003).

Mr. Hopkins filed a Tenn. R. App. P. 11 application seeking review of this court's decision to require him to pay Ms. Hopkins $800 per month in child support. The Tennessee Supreme Court first concluded that awarding equal parenting time is "permissible."[1] Then, turning to the issue of child support, the court held (1) that determining the amount of child support must be done on a case-by-case basis when the parents have equal parenting time,[2] (2) that reducing child support to zero was permissible, but not necessarily required, when parenting time is divided equally,[3] (3) that only parents designated as the primary residential parent are entitled to receive child support,[4] and (4) that the courts must designate one of the parents as the primary residential parent in every case, even when the parents have been awarded equal parenting time.[5] Applying these principles to the facts of the *Hopkins* case, the court overturned our decision to require Mr. Hopkins to pay Ms. Hopkins $800 per month in child support *solely* because we had not designated Ms. Hopkins as the primary residential parent. The court then remanded the case with directions to enter a parenting plan designating a primary residential parent and calculating child support. *Hopkins v. Hopkins*, 2004 WL 2151200, at *3.

Once the Tennessee Supreme Court has addressed an issue, its decision regarding that issue is binding on the lower courts. *State v. Irick*, 906 S.W.2d 440, 443 (Tenn. 1995); *Payne v. Johnson*, 2 Tenn. Cas. (Shannon) 542, 543 (1877). Thus, this court is bound to adhere to the decisions of the Tennessee Supreme Court. *Bing v. Baptist Mem'l Hosp.*, 937 S.W.2d 922, 925 (Tenn. Ct. App. 1996); *Schultz' Estate v. Munford, Inc.*, 650 S.W.2d 37, 39 (Tenn. Ct. App. 1982). The court has even admonished us that we are not free to disregard its dictum when the court is speaking directly on the matter before it and it is seeking to give guidance to the bench and bar. *Holder v. Tennessee Judicial Selection Comm'n*, 937 S.W.2d 877, 881-82 (Tenn. 1996).

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[1] *Hopkins v. Hopkins*, 2004 WL 2151200, at *2.

[2] *Hopkins v. Hopkins*, 2004 WL 21512000, at *2.

[3] *Hopkins v. Hopkins*, 2004 WL 21512000, at *2; *Gray v. Gray*, 78 S.W.3d at 884.

[4] *Hopkins v. Hopkins*, 2004 WL 21512000, at *3; *Gray v. Gray*, 78 S.W.3d at 884.

[5] *Hopkins v. Hopkins*, 2004 WL 21512000, at *2, 3. A dissenting justice characterized this holding as "contrived." *Hopkins v. Hopkins*, 2004 WL 21512000, at *4 (Barker, J., dissenting). We confess our inability to understand how a parent who has been awarded 50% of the parenting time can be designated as a primary residential parent in light of Tenn. Code Ann. § 36-6-402(4) (2001) which defines "primary residential parent" as "the parent with whom the child spends more than fifty percent (50%) of the time." If a child is residing with a parent for 50% of the time, that same child cannot be spending *more* than 50% of the time with that same parent.

We are bound to follow *Hopkins v. Hopkins* despite the practical difficulties that will surely follow in its wake.[6] Accordingly, we conclude that the trial court erred first by failing to designate either Mr. Davis or Ms. Smith as the primary residential parent and second by basing its child support decision solely on the fact that the parents had equal residential time. We, therefore, vacate the portion of the trial court's final order regarding child support and remand the case to the trial court with directions to designate a primary residential parent and to address the question of child support as required by the *Hopkins v. Hopkins*.

V.

We affirm the portion of the judgment granting the parents equal residential time. We vacate the portion of the judgment terminating Mr. Davis's child support obligation and remand the case for a timely hearing consistent with *Hopkins v. Hopkins* and this opinion. Neither party shall have an obligation to pay child support unless the trial court, following a hearing, determines that child support is warranted. We tax the costs of this appeal in equal proportions to Tonya Smith Davis and her surety and to Mark Dion Davis for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., P.J., M.S.

[6] When parents have been granted equal parenting time, the designation as "primary residential parent" will become a hotly contested issue because of the perception that it might have some future value. Parents who might otherwise be inclined to pay child support to equalize the resources available to their children will no longer offer to do pay support because it will necessarily result in the other parent being designated as the primary residential parent.